

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1932

In the Name of Legislative Intention

Frank Edward Horack Jr.

Indiana University School of Law - Bloomington

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>



Part of the [American Politics Commons](#), [Legislation Commons](#), and the [Political History Commons](#)

Recommended Citation

Horack, Frank Edward Jr., "In the Name of Legislative Intention" (1932). *Articles by Maurer Faculty*. Paper 1196.
<http://www.repository.law.indiana.edu/facpub/1196>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

IN THE NAME OF LEGISLATIVE INTENTION

FRANK E. HORACK JR.*

Jeffersonian conceptions of individual freedom and equality have kept alive the doctrine that our government is one of laws and not of man. In this idea there is safety, for if law is justice and judicial opinions are produced, cellophane wrapped, by some monotonously automatic process which man cannot disturb, then man lives "*non sub homine sed sub deo et lege*", and is free from mortal tyranny. This Latinism, however, is too easy an answer to the problem of law and government, and men came to suspect that "homine" came first in the business of governing men, just as it did in the motto. God and the law were, at best, only second place.

In practice law enforcement and judicial decision depend, upon man and not upon the law itself. Man controls the law rather than law controlling man. Man can do with law what he wishes so long as he uses the sanctioned form. Thus Rabelais tells us that Judge Bridlegoose was threatened with impeachment not because he gave the wrong decision but because he used large dice in a doubtful case.¹ The controlling rule was a formal one requiring small dice for hard cases—the result was not important.

* Assistant Professor of Law, West Virginia University.

¹ "My practice is . . . as the custom of the judiciary requires, . . . having exactly seen, surveyed, overlooked, received, recognized, read, and read over again, turned, and tossed over, seriously perused and examined, the bills of complaints, accusations, impeachments, indictments, warnings, citations, summonings, comparisons, appearances, mandates, commissions, delegations, instructions, informations, inquests, preparations, productions, evidences, proofs, allegations, depositions, cross-speeches, contradictions, supplications, requests, petitions, enquires, instruments of the deposition of witnesses, rejoinders, replies, confirmations of former assertions, answers to rejoinders, writings, deeds, reproaches, disabling of exceptions taken, grievances, salvation-bulls, re-examination of witnesses, confronting of them together, declarations, denunciations, libels, certificates, royal missives, letters of appeal, letters of attorney, instruments of compulsion, delinatories, anticipatories, evocations, messages, dimissions, issues, exceptions, dilatory pleas, demurs, compositions, injunctions, reliefs, reports, returns, confessions, acknowledgments, exploits, executions, and other such like confects and spiceries, both at the one and at the other side, as a good judge ought to do, . . . (then) I give out sentence in his favor unto whom hath befallen the best chance by dice; . . . 'But', quoth Trinquamelle, ' . . . how come you to know, understand, and resolve the obscurity of these various and seemingly contrary passages in the law, which are laid claim to by the suitors and pleading parties?' 'Even just', quoth Bridlegoose, 'after the fashion of your worships; to wit, when there are many bags on the one side and on the other, (that is, if the case is doubtful) I then use my little small dice . . . in obedience to the law . . . I have other large dice, fair and goodly ones, which I employ . . . when the matter is more plain, clear and liquid; . . .'" RABELAIS, GARGANTUA ET PANTAGRUEL, III, 39.

The modern refinement of this anecdote is that Bridlegoose, J., used the right sized dice and thus could not be convicted even though the dice were loaded.² In fact it is suggested that all judges use loaded dice. That is, for every legal situation there are sufficient rules reaching enough diverse results that as judges select their rules they have likewise selected their results. The judicial process is a process of preference.³

Some legal commentators have thus concluded that law is only what the judges say it is—that it is but a record of past events and exists neither for the present nor for the future. Fortunately law is more than this. Many men rely upon it throughout active lives without the tragedy of a law suit. Law is predictable—the difficulty is that the basis of its predictability may not be upon the basis of time honored rules which have outlived their usefulness but upon elements recognized but not expressed in the opinions of the judges.

This is particularly true in the field of statutory interpretation. The judges still do lip service to canons propounded in Coke's time and perpetuated by Kent⁴ and Blackstone,⁵ although the decision of the cases rest upon more significant bases.

I

It is axiomatic that there is no problem of interpretation when the legislative declaration is clear, direct, and precise. Interpretation is legitimate only in case of ambiguity. But what is clear? What ambiguous? When X says, "A big bundle of bills came this morning", does Y know what X received? Was it a handsome stack of 'greenbacks', bothersome evidences of unpaid debts, or a package intended for his friend, William? The statement is clear to X; to Y it may or may not be ambiguous. To objectively evaluate the statement is misleading and inaccurate. Classification of it is unimportant. Y is only interested in learning what meaning X is trying to convey. A similar interest should motivate courts in the use of statutory materials.

² Another modern view suggests that the case was decided while the judge was eating breakfast.

³ Judges "must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through centuries of the common law have set to judge-made innovations. But within the limits thus set, within the range over which choice moves, the final principle of selection for judges, as for legislators, is one of fitness to an end." CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1928) 103.

⁴ 1 COMMENTARIES (14th ed. 1896) 610 *et seq.*

⁵ 1 COMMENTARIES 85-91.

The problem of interpretation when applied in the field of government arises because the legislature makes the law⁶ and the courts apply it. And since the departmentalization of government,⁷ the task of applying generalized standards of conduct to particularized consequences makes even an honest difference of opinion inevitable. This conflict is expressed, in the language of statutory interpretation, by declarations that statutes are either clear or ambiguous.⁸ The conclusion is that if the statute is ambiguous it is in need of interpretation. In fact, the interpretative process, at this point has been practically completed. Interpretation is but comparison and judgment and both of these processes take place before the court can determine the existence of ambiguity. Nothing is ambiguous in the abstract; or else, everything in the abstract is ambiguous.

Thus if a specific statute is to be applied to a specific case there must in every instance be interpretation.⁹ It may be brief; but it must exist. The mere recognition that the statute applies or does not apply involves the interpretative process. A realization of this fact will not require, however, a written opinion on interpretation in every case in which statutory materials are used. On the contrary, in many cases long opinions justifying the application of apparently relevant and unambiguous statutes will be unnecessary. In short, if statutory materials were treated more analogously to case materials, a more natural relationship between case and statute law might be established.

Instead, artificial canons of inquiry have been created by which the applicability of the statute is tested and then by equally artificial standards of value the validity of the interpretation is evaluated. Since Austin's time interpretation has been classified as

⁶Of course there are other agencies for the formation of law. "But among one hundred and fifteen million people the bulk of those who think at all on the subject believe that they elect senators and representatives to 'make' their laws, and that the judges only 'interpret' and 'enforce' the laws that other people make. No other popular conception is equally untrue except the belief in Zion City, Illinois, that the world is flat." Richberg, *The Judicial Barricades* (1929) 62 SURVEY 479, 503.

⁷Originally there was no problem of interpretation for the judges were also members of Parliament. Thus in *Auymeye v. Anon.*, Y. B. 33 & 35 Edw. I, 82, Hengham, J., said to counsel "Do not gloss the statute; for we know better than you; we made it." See also *Anon. v. Thomas the Notary*, Y. B. 32 & 33 Edw. I, 429, where Hengham said, "We agreed in Parliament . . . etc."

⁸But see, *Caminetti v. United States*, 242 U. S. 470, 37 S. Ct. 192 (1916) in which case five justices found the act clear and unambiguous, while three of their brethren found the act in need of interpretation.

⁹" . . . interpretation never has been and never can be wholly dispensed with, owing to the nature of our minds" Loyd, *The Equity of a Statute* (1909) 58 U. OF PA. L. REV. 76, 80.

genuine and spurious. Genuine interpretation is said to be the process by which a court applies a statute either literally or by trying to find "directly what the law-maker meant by assuming his position in the surroundings in which he acted and endeavoring to gather from the mischiefs which he has to meet and the remedy by which he sought to meet them his intentions with respect to the particular point in controversy".¹⁰ Spurious interpretation "seeks to reach the intent of the law-maker indirectly. It assumes that the law-maker thought as we do on general questions of morals and policy and fair-dealing".¹¹

This classification accepts one process and stigmatizes the other. It attempts to say that the interpretation which actually discovers the legislative intention is good and the interpretation which does not attempt to discover the legislative intention is bad. But it is as likely to put sheep in wolf skins as it is to trick the unwary lamb, for the two methods of interpretation are not as easily distinguishable as their definition might suggest.

For example, in *Holy Trinity Church v. United States*,¹² the Supreme Court held that the Alien Labor Act did not prevent a New York church from contracting with an English pastor for "labor and services" to be performed in this country. The act prohibited any contract with an alien for labor or services prior to his migration or importation. Certain skilled and professional groups were specially exempted from the operation of the act. Ministers of the gospel, however, were not included in this exemption. The court said the act would not apply for "we cannot think Congress intended to denounce with penalties a transaction like that in the present case".¹³ The style of this language is purely subjective and by that test the interpretation, spurious. But if this intention existed in fact it can hardly be said the interpretation is bad if it reaches the same result reached by Congress.¹⁴

Thus accidents in expression often determine the interpretative process as genuine or spurious. Thus if the court uses direct and positive language to describe the "condition which was before the legislature and which resulted in the enactment of the statute" their interpretation will probably be called genuine; but if with

¹⁰ Pound, *Spurious Interpretation* (1907) 7 COL. L. REV. 379, 381.

¹¹ *Ibid.* 381.

¹² 143 U. S. 457, 12 S. Ct. 511 (1892).

¹³ *Ibid.* at p. 459.

¹⁴ But quære whether Congress ever had any intention one way or another on this question? The probability is that it never occurred to them and it was not considered.

greater caution they declare the statute resulted from "those conditions which we believe the legislature must have considered", the interpretation will be labelled spurious. In other words, any indication that the interpretation does not result from objectively determinable materials will taint the character of the interpretation. But the truth is that all of these problems are considered subjectively—the judge weighing the knowledge he has of the reason for the legislation with his own experience and the necessities of the case before him. To make an objective and subjective classification of interpretation is at best to make only a distinction of degree.

This distinction which has been expressed in terms of genuine and spurious interpretation may have some foundation in the dual problem involved in all interpretation—that is, the problem of language and the problem of policy. Perhaps we may say that genuine interpretation concerns itself only with the clarification of language while spurious interpretation attempts to determine, or in many cases, substitute for the legislative policy the policy of the courts. But even such a distinction as this helps but little, for most problems of language arise because of differing beliefs concerning the wisdom of legislative policy. Thus any attempt to treat these two problems independently would overlook the actual fact that they most frequently exist together.

This is well illustrated by *Powell v. Kempton Park Racecourse Co.*,¹⁵ where the court was required to interpret the meaning of the word "place". Generally, a racecourse can be considered a "place". But the question was whether it was a place within the meaning of the Betting Act of 1853, which provided that "No house, office, room or other place shall be opened, kept, or used for the purpose of * * * betting * * *."¹⁶ In the Queens Bench five judges held that it was not a place, one judge held that it was. Upon appeal four agreed that they thought it was not a place; two judges dissented. Clearly a racecourse was a *place* but whether it was a *place for betting* depended not upon any rules of language or of logic but upon the policy announced by Parliament. The policy, not the words alone, determined the result.¹⁷

¹⁵ (1897) 2 Q. B. 242; (1899) App. Cas. 143.

¹⁶ 16 & 17 Vict., c. 119, § 1.

¹⁷ " . . . unfortunately in the cases in which there is real difficulty it (interpretation) does not help us much, because the cases in which there is real difficulty are those in which there is a controversy as to what the grammatical and ordinary sense of the words used with reference to the subject matter is." Lord Blackburn in *Caledonian Ry. Co. v. No. British Ry. Co.* (1881) 6 App. Cas. 114, 133.

The problem thus becomes more than a problem arising from the application of formal rules of interpretation; it becomes a problem of separation of powers, of inter-departmental relations. Until the court's conception of its own position in the application of statutes is appreciated, the difficulties with the formal rules cannot be understood. When the court is applying abstract and often uncertain legislative declarations of rules, principles, and standards it will be seriously influenced by the philosophical ideal in which it pictures its own position.

The courts, for example, have not changed their technique in handling statutory materials although the court's position in relation to statutory materials has been completely altered. Where courts were once considered purely as common law tribunals, the enormous increase in statutory material has changed the actual function of courts of law to approximate more closely the civil law ideal of courts as agencies for the application and administration of the legislative precept. Law is no longer the sacred precept of the court but the common property of the masses. It is the expression of what they believe to be their will¹⁸ and it is not for the courts to frustrate it because of too nice legalistic conceptions of law and government. But the common law traditions have not been so easily overthrown. Consequently the courts still view the products of the legislative assemblies from attitudes which are unknown and unpersuasive to the legislators.

Another cause of the courts' unreadiness to make more liberal use of statutory materials, is the case-law tradition of the common law system. Courts have traditionally looked to cases for the solution of cases and have only interstitially relied upon the statutes. It is a reflection of the distrust with which the judges viewed legislation which attempted to change the legal order as they had constructed it.¹⁹ The canons of interpretation likewise reflected the attitude, and thus the rules of strict construction of statutes in derogation of the common law, strict construction of penal statutes, and the like, were developed.

Because of the inapplicability of many of these canons of interpretation and the apparent harsh results that have sometimes resulted from formalist application of these rules the courts have received much criticism. The burden of this criticism is

¹⁸ See Cain, *The Will of the People* (1929) 16 Am. Mer. 394.

¹⁹ Originally courts refused to change the common law upon the enactment of a statute unless the common law was specifically abrogated by negative words. It was only reluctantly that they implied an intent to abrogate when the words used were in the affirmative. See *Townsend's Case*, 1 Plowd. 222a, 234a.

that rules are forms by which the courts reach the results they wish, and the "intention of the legislature" is used to give some judicial justification to the result. In spite of such criticism some of the rules of interpretation may operate in a pragmatically satisfactory manner if unhampered by agglutinative refinements. One of these rules is the much maligned rule that statutes should be interpreted according to the "intention of the legislature".²⁰

II

From the beginning, it should be understood that the success of this method of interpretation depends on the elimination of the artificial classification of statutes into those which are clear and those which are ambiguous. The objection that it would be dangerous to allow a court to interpret a statute which is clear and precise is not valid. If the purpose of interpretation is to determine the legislative intention, then, interpretation of that which is clear and precise is of the safest variety for it is almost certain of applying the statute in accord with the wish of the legislature.

The more usual objection is that there is no such thing as legislative intention. It has been said frequently, that the problem of interpretation is to give meaning to that which is meaningless.²¹ To do this the court must give expression not to what the legislature thought but to what they would have thought had they thought. And even when some demonstrable intention appears to exist it is difficult, as Radin has pointed out, to say that the legislature, as a group, had intention, "in connection with words which two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs".²²

The accuracy of this observation cannot be questioned. General legislative purpose,²³ in statutes of general public concern, is

²⁰ An early statement of the rule may be found in *Heydon's Case*, 3 Co. Rep. 7, 7a (1584). "And then the office of all the judges is always to . . . add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*."

²¹ ". . . when the legislature has had real intention one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was . . . The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; . . ." Gray, *NATURE AND SOURCES OF THE LAW* (1909) 165.

²² Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863, 870.

²³ General legislative purpose is to be distinguished from the precise intent that may or may not exist in regard to specific situations. Thus in the

at times discoverable, but to credit the legislature, taken collectively, with intention expressed in unequivocal terms upon specific statutory provisions, seems difficult, if not impossible. But even this admission does not necessarily drive us to accept Radin's further contention that because of the ephemeral character of legislative intention, "it is a futile bit of fiction". Indeed, either to affirm or deny the existence of legislative intention is to undertake one of the tasks of Hercules.

There always exist, however, the practical necessity of giving some effect to the legislative enactment. Upon occasion legislatures have seen fit to enact legislation without a definite enunciation of policy,²⁴ have failed to express their policy adequately,²⁵ or because of the elapse of time their intention has become uncertain.²⁶ In these situations it seems commensurate with our ideals of efficiency and economy to allow the court to apply the legislation according to the rule which they believe the legislature would have provided. This is admittedly "judicial law-making" but the exercise of the power in this limited field of application in no way hinders the legislature from altering the rule or standard if they do not approve of the interpretation adopted by the court. The objection to this, of course, is that it permits the

Caminetti case, *supra* n. 8, the general legislative purpose was the suppression of immoral practices. But whether or not Congress intended to prohibit certain kinds of immoral practices was open to reasonable doubt.

²⁴ See, for example, the Sherman Anti-Trust Act of 1890. The exigencies of the situation may at times require that policies be compromised, changed, or even abandoned in order that some action result from the legislative session. Or the majority and the minority may agree that some legislative action is desirable but disagree as to the policy to be adopted and the end to be achieved.

²⁵ X was driving a team of oxen along a railroad right of way. They became frightened and ran into the defendant's engine. A statute provided that "when any cattle or other live stock shall be killed by the engines or cars running on any railroad, it shall be prima facie evidence of negligence on the part of the company" *Randall v. Railroad*, 107 N. C. 748, 12 S. E. 605 (1890). Three judges said the statute applied; two dissented. Shepherd, J., dissenting, said "When one is driving his horse, or a lady is riding her pony, is it customary to say that the man is driving one of his 'cattle', or that the lady is riding one of her 'live stock'?" . . . The mere statement of the question . . . furnishes its own answer." What did the legislature intend? Was there attention directed toward this situation? For a similar difficulty consider the problem of the application of criminal statutes in tort situations for the purpose of making non-negligent action negligent. *Gorris v. Scott*, L. R. 9 Ex. 125 (1874); *Scott v. Missouri-Kansas-Texas Ry. Co.*, 22 S. W. (2d) 654 (Mo. 1929); *Bott v. Pratt*, 33 Minn. 323 (1885).

²⁶ See *Tripp v. Goff*, 15 R. I. 299 (1886). Cf. *McBoyle v. United States*, 283 U. S. 25, 51 S. Ct. 340 (1931) (The question was whether Congress intended to include airplanes in the definition of motor vehicle. The court said, "Airplanes were well known in 1919 when this statute was passed, but it is admitted that they were not mentioned in the reports or in the debates in Congress.")

subjective determination of policy to rest with the courts and not with the legislatures. But it is not to be overlooked that in the determination of every case the policy involved and the result to be reached is not overlooked by the judge.²⁷ It is a psychological impossibility. For as Radin says, "It is obvious that somewhere, somehow, a judge is impelled to make his selection—not quite freely, as we have seen, but within generous limits as a rule—by those psychical elements which make him the kind of a person he is. That this is pure subjectivism and therefore an unfortunate situation is beside the point. It is hard to see how subjectivism can be avoided or how the personality of the judge can be made to count for nothing in his decision on statutory interpretation as on everything else".²⁸ This states the difficulty but it is no basis for concluding that the use of legislative intention as a guide to the interpretation of statutes should be abandoned. True, it is desirable that the discretionary power of the courts which tends to make them law-makers should be limited; but it is also desirable that legislation be applied to cases which the legislature did not contemplate but would have regulated if they could have foreseen them. Some adjustment is necessary and apparently it is some device by which the courts can apply these "doubtful" statutes (which probably is, a more sociologically desirable thing to do than to declare that in as much as the legislature has not clearly stated its will the court will not attempt to deal with the case at all) in as objective a manner as possible. The "intention of the legislature" rightly applied reaches this result with the least difficulty and with the greatest protection to those who fear oppression from judicial discretion.

III

In negligence cases a similar problem has confronted the courts and they have sought to meet the difficulty involved in subjective and objective tests of fault and care by applying a standard of "what a reasonable man would do under the circumstances". No one suggests that a reasonable man must actually exist, or that the doctrine is necessarily undesirable because of his non-existence. Nor is the use of the reasonable man test a panacea for all the difficulties inherent in the tort problem; but as a tool

²⁷ "Hence, I will not hesitate in the silence or inadequacy of formal sources, to indicate as the general line of direction for the judge the following: that he ought to shape his judgment of the law in obedience to the same aims which would be those of a legislator who was proposing to himself to regulate the question." Cardozo, *op. cit. supra* n. 3, 120.

²⁸ Radin, *op. cit. supra* n. 22, 881.

intelligently used it affords a means of increasing objectivity. The "legislative intention" test does the same for statutory interpretation.

If a man acts willfully and knowingly he is judged in tort by his acts; the same is true of legislative action. Where the legislative policy can be discovered and the court applies that policy, there can be no valid criticism of the court's action. And in many situations the legislative intention is discoverable. The process of discovery may at times seem new and strange to the profession but for the diligent it offers unrevealed possibilities.

Science has found the study of embryology to illuminate the understanding of human evolution; the embryonic stages of legislation furnish equally valuable service to the interpreter of statutes. The Delphic utterances of our legislatures often take meaning when former legislation and its difficulties are considered,²⁹ or when the legislative history of the instant statute with its amendments, alterations, and substitutions is made clear.³⁰ Likewise, the committee hearing,³¹ the committee report,³² the explanation of the committee chairman,³³ and the resulting legislative action often make clear words which till then were uncertain and

²⁹ For example, the Jones-Stalker Amendment, Act of Mar. 2, 1929, c. 473; 45 Stat. Pt. 2, 1446 (1929); 27 U. S. C. A., § 91 (1931 Cum.), to the National Prohibition Act cannot be well understood without an appreciation of the difficulties attendant on the enforcement of the original legislation. See also, Landis, *A Note on 'Statutory Interpretation'* (1930) 43 HARV. L. REV. 886, 891 and *Holy Trinity Church v. United States*, *supra* n. 12, at 143 U. S. 465; *Stafford v. Wallace*, 258 U. S. 495, 42 S. Ct. 397 (1922).

³⁰ See Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 85; *United States v. Pfitsch*, 256 U. S. 547, 41 S. Ct. 569 (1921); *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238, 22 S. Ct. 881 (1902).

³¹ *Penn. Mut. Life Ins. Co. v. Lederer*, 252 U. S. 523, 534, 40 S. Ct. 397, 401 (1920).

³² "It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment But the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to with proper qualifications." *United States v. St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 318, 38 S. Ct. 525, (1910). It is interesting to note that in spite of a continual denial of admitting legislative debates the court in *Dunlap v. United States*, 173 U. S. 65, 75, 19 S. Ct. 319 (1899) said, "without questioning the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute . . . it is nevertheless interesting to note that efforts were made in the Senate to amend the bill" Perhaps at some future time the courts under proper restrictions will admittedly give some considerations to information derived from such source.

³³ *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 474-477, 41 S. Ct. 172 (1921); *Wisc. Ry. Comm. v. Chicago, B. & Q. R. R. Co.*, 257 U. S. 563, 589, 42 S. Ct. 232 (1922).

ambiguous. Interpretation founded on such materials is real. There is actual safety in such interpretation. It should be encouraged.

But where the legislature has had no intention,²⁴ or where its explanatory materials²⁵ are as ambiguous as the legislation itself there is real difficulty in applying the rule of "legislative intention". To speak in these instances of finding the legislative intention is "to condone atavistic practices too reminiscent of the medicine man".²⁶ There is, of course, no real intention. But again the tort rule furnishes assistance. Where uncertainty exists concerning certain conduct we test it by applying the "reasonable man" test. Is there not also a "reasonable legislature" test to be applied in this interpretation situation?

Actual legislative materials are lacking. It is desirable that the statute be interpreted and applied to the particular case. It does not seem unreasonable, then, that the court should have the power of applying the statute. But all will agree that their discretion should be limited. What would be an easier or more practical way than to require the court to determine the meaning of the statute according to the intention which it believes the legislature would have adopted had the problem been called to their attention?

The very fact that courts feel reticent to express their own opinion concerning the meaning of legislation and feel that they should seek the intention of a body similar to that which enacted the statute is of considerable aid in limiting the more or less unrestrained discretion that courts possess. Thus while this method will not prevent "judicial law-making" it will help to control it and tend to make it more predicable, though, of course, the objection to judicial law-making is not that it is not predicable but that it is judicial.

Dean Pound has discouraged this kind of interpretation, that is, spurious interpretation, because he said it subjected courts to

²⁴ That is, where the legislature had no intention other than that the common law situation be changed. See n. 24, *supra*.

²⁵ It is not unnatural that in cases of sharp differences of opinion where the policy is complex and the struggle bitter that the committee reports, the hearings, and the legislative procedure will not present a clear or determinative picture of the policy of the statute. In such case the observation of Campbell, C. J., in *Chicago & A. R. R. Co. v. United States*, 49 Ct. Cl. 463, 500 (1914) is not amiss, "These references were not made by the court in order to ascertain the meaning of the act, but rather and usually *arguendo* as vindicating and confirming the conclusion which the court would and did reach without recourse to such extrinsic matter to enable it to reach this conclusion".

²⁶ Landis, *op. cit. supra* n. 29, at 891.

three dangers.⁸⁷ It brought the law into disrepute. It subjected the courts to political pressure. It introduced the personal element into adjudication. While these three dangers no doubt exist they do not entirely preclude the use of an interpretation which avowedly attempts to inculcate meaning where it is totally absent.

The pressure of the law and of legal sentiment is an effective device for keeping the interpretative process from dragging the law into disrepute, for Pound, himself, has told us that the judges feel most keenly the comment and criticism which is directed at them by their professional associates on the bench and at the bar. If courts refuse to apply their technique to the solution of cases merely because the legislature has not clearly set forth a standard, they endanger their reputation to a far greater degree when a strong popular sentiment clamors for the extension of legislative relief. The danger of political pressure is no doubt a real one, but the judicial consciousness that their decisions if unfounded will bring them into "disrepute" will furnish the needed safeguard. The third danger, the introduction of the personal element into adjudication is not an introduction at all; Radin has expressed it well when he said "it is hard to see how subjectivism can be avoided". Spurious interpretation does not introduce subjectivism; it is merely an expression of a condition already existing.

These dangers inhering in making the court, as some have styled it, a third house of a tricamerally organized legislature depend chiefly upon the character of the court itself. No system can entirely eliminate the human element. It has done enough if it guards against the abuse of individual discretion, for a certain amount of choice in the application of abstract rules is inevitable. The technique and tradition of the legal profession, and of the judges whom we draft from it, will afford the protection against abuse from within and the approbation or condemnation of the profession will have the necessary deterring effect from without. Interpretation which seeks real intention and only when it does not exist, seeks the intention the legislature might be assumed to have intended will not greatly endanger the supposed balance of our institutions.

The solution of the problem which makes interpretation necessary is largely with the legislature. There is less necessity for interpretation, particularly of the objectionable character, if

⁸⁷ Pound, *op. cit. supra* n. 10, at 384.

the statutes are carefully drafted. Most interpretative problems arise from legislation prepared by careless and un-skilled legislators who still believe there is something thaumaturgic about the phrase "Be it enacted".⁸⁸ A thorough appreciation of the pre-legislative, the social, economic, as well as the legal difficulties involved; skill in directing legislative procedure, so that each step in the consideration of the act will leave a photostatic impression that can be presented in court; and acumen in the mechanics of draftsmanship that the imperfections in human expression may be reduced to a minimum; are necessary before the legislative process can present materials accurate enough to make interpretation a true and reliable science.

This, of course, is an easy way for lawyers and courts to shift responsibility. But legislatures are not free from censure, for most of them have been un-interested in correcting their procedure, recording their committee hearings and reports, or improving the form and content of their statutes. Although, some years ago there was a fairly widespread adoption of the legislative reference bureau the force of its valuable assistance has been felt in but a few states and in Congress. Legislators have not forgotten that "statutes like razors must be made to sell".

Consequently so long as ambiguity is to human advantage there will be need for interpretation and courts and lawyers will bear its burden. And as it is desirable at times to be ambiguous, so it is frequently desirable to insure the certainty of legislative intention with explicit extrinsic material. Thus in most cases diligent search will discover real and legitimate legislative intention.

We worship false gods if we malign a search for legislative intention because some have under its protective cloak borne it false witness. Legislative intention is discoverable for those who do not fear the unexplored pages of the statute books and their official glosses.

⁸⁸ The "guinea-stamp of the sovereign" is not enough to make legislative enactments "law". Perhaps we must return to such devices as the preamble, used in some disguised form as in the Interstate Commerce Act, as amended by the Transportation Act of 1920, § 15a (5). See also the Federal Labor Act, May 20, 1926, 44 Stat. 577 (1926); Federal Radio Commission Act, Feb. 23, 1927, 44 Stat. 1162 (1927).